United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

#974

BRIEF FOR APPELLANT

F 974

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20980

ROOSEVELT BYNUM,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from Judgment of the United States
District Court for the District of Columbia

EDGAR T. BELLINGER
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Attorney for Appellant
(Appointed by this Court)

Questions Presented

In the opinion of appellant the following questions are presented:

1. When there is a delay of 537 days between arrest and trial caused by the court calendar and the prosecution through no fault of an accused, is his constitutional right to a speedy trial violated?

2. If an accused's trial is not commenced after five successive scheduled trial dates through no fault of his own, and his case is thereafter given no trial date until finally placed at the bottom of a calendar list of "ready" cases by the prosecution some 125 days later, has his constitutional right to a speedy trial been violated?

3 When the prosecution is responsible for assigning cases to the trial calendar, and it delays for approximately two months before assigning a case to the bottom of the list although that case had already been ready for trial for more than 238 days and had its trial date previously continued five successive times without the accused's consent, is delay so arbitrary, capricious, and unreasonable as to violate the accused's constitutional right to a speedy trial?

4 In a murder prosecution where the sole defense is self-defense, does the trial court commit reversible error in giving confusing instructions to the jury as to self-defense and by implying that the burden of proof of that defense rests on the accused?

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20930

ROOSEVELT BYNUM,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was indicted in the court below for second degree murder (22 D.C. Code § 2403). Jurisdiction was vested in that court by virtue of 11 D.C. Code § 521. He was convicted of manslaughter and sentenced to a term of 'Five (5) Years to Fifteen (15) Years' imprisonment.

Appellant thereafter filed an application for leave to proceed on appeal without prepayment of costs which was granted by the court below. Jurisdiction is vested herein by virtue of 28 U.S.C. §§ 1291, 1294.

STATEMENT OF THE CASE

On August 15, 1965, appellant, a bricklayer, was living in a first floor apartment at 637 Maryland Avenue, NE., in the District of Columbia. Living with him was Mable O. Renfrow, their two children, and her three other children, appellant having 'told the welfare people that he would assume the responsibility of the entire family." (Tr. 10, 34, 42-44) While Mrs. Renfrow had been separated from her husband Willie Smith for some two and a half years(Tr. 26-9), he sometimes came back to see the children. (Tr. 36) On an earlier occasion appellant and Smith "got to fighting" and Smith knocked appellant down with an iron pipe (Tr. 37, 53-54).

On Sunday, August 15, 1965, appellant, who had been drinking with Smith and two friends, returned to his home. Smith asked if appellant had any gin; and when appellant replied that he had two more half pints, Smith asked to come in. Appellant and Smith then entered the apartment and ate, talked, and drank some more. (Tr. 45-46) Later, "Smith began to get displeased,' and appellant told him to go home but he wouldn't. (Tr. 10) The appellant asked Mrs. Renfrow and Smith's daughter to ask Smith to go home. (Tr. 11) Finally, after appellant again asked Smith to go home since he (appellant) had to work in the morning, Smith jumped up and said ' I'm going to do you in

this time." Appellant replied "Get out of here,' but Smith grabbed 'something' (which turned out to be a plate) and hit appellant over the head. Appellant grabbed a knife which was lying on the stove, and stabbed Smith. (Tr. 12, 50-52). Smith was grabbing at appellant who then was stabbing. (Tr. 55) When Smith fell on the floor, appellant noticed the blood, and ran outside. (Tr. 65) A cruising police car stopped, and appellant approached the officers, told them he had just killed somebody, and handed over the knife. (Tr. 6-8) Smith was pronounced dead on arrival at D. C. General Hospital (Tr. 3). There were a total of 30 cuts and stab wounds on the front of the body. (Tr. 21)

Appellant was taken before the U. S. Commissioner, and after a postponement to August 24, was held for action of the grand jury, which, on September 20, 1965, presented an indictment for second degree murder. (Commissioner's record, Indictment) Appellant was arraigned on October 1, 1965, and trial was set for November 16, 1965; however, on this date, the case was continued by the Assignment Office until December 8, 1965, (since defense counsel had another case already set for December 8, the trial date was reset to January 4, 1966). On January 4, 1966, trial was still not held. An attachment was issued, however, for a government witness, Mrs. Renfrow. No continuance apparently was granted, but the next trial date appears to have been set for March 7, 1966. Nevertheless, on this date the case was again

continued for the reason that the prosecutor was 'in trial'. The new date assigned was April 26, 1966. On this date, the case again was continued by the Assignment Office, the first date of May 31, 1966, being changed to July 12, 1966, because defense counsel already had 'a jail case scheduled' for the May 31 date. There is no record of any action taken on this date. The next assigned trial date appears as January 3, 1967, when defense counsel sought and was granted his only postponement. On February 6, 1967, trial commenced. (Jacket entries) Mrs. Renfrow, two police officers and the deputy coroner testified for the prosecution. Appellant testified in his own defense.

Following the trial judge's instructions, the jury retired, but subsequently sent some questions as follows:

'We would like the following definitions:
1. Malicious
2. Criteria for a self-defense plea
3. Manslaughter
4. Assault with deadly weapon

"Does self-defense enter into the verdict of not guilty; guilty of manslaughter and guilty of assault with a dangerous weapon." (Notes)

The court then gave the jury additional instructions. (Supp. Tr.) On February 9, 1967, the jury returned a verdict of guilty of manslaughter. On March 30, 1967, appellant was sentenced to a term of imprisonment of 5 to 15 years. This appeal followed. (Record)

STATUTES AND RULES INVOLVED

United States Constitution, Amendment VI provides:

> 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Title 22, District of Columbia Code, Section 2403, provides:

> "Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 800; June 12, 1940, 54 Stat. 347, ch. 339.)"

Title 22, District of Columbia Code, Section 2405, provides:

> 'Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 802.)"

Federal Rules of Criminal Procedure, Rule 48 (b), provides:

> "BY COURT. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

Federal Rules of Civil Procedure, Rule 52 (b), provides:

> "PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.'

Rule 87 of the United States District Court for the District of Columbia provides as follows:

"(a) Immediately following the return of an indictment the United States Attorney will assign that case to an Assistant United States Attorney for all purposes.

(b) On the second Friday following indictment the defendant will be arraigned and counsel ascertained. The details of all arraignments on that particular day will be handled by one Assistant United States Attorney designated for that purpose.

(c) Unless otherwise indicated by the Chief Judge all arraignments will be conducted by the Chief Judge who will additionally perform such other duties and assignments as are appropriate, including general supervision of the criminal docket.

(d) All motions (e.g., discovery, suppression of evidence, severance, mental observation, etc.) must be in writing and filed within twenty (20) days after arraignment. No extensions of time will be granted and no tardy motions considered except for good cause shown. Motions will be set for hearing the second Friday following the filing of the motions. The Government shall respond in writing to any motions presenting complex fact situations or substantial questions of law, and in any event upon request of the trial judge, citing authority in support of the Government position. The Government response shall be filed not less than two (2) days prior to the date set for hearing of the motion.

(e) Motions will be heard on Fridays only except in emergency situations to the end that there shall be no interference with the trial of cases during the first four days of the week. Emergency motions arising during the week will generally be heard by the Chief Judge. No such emergency motions shall be heard ex parte and, if argued in any other court than that of the Chief Judge should be heard before or after the time normally given to the trial of cases.

(f) Pretrial hearings under Rule 17.1 will be held on Fridays only.

(g) A Reserve Calendar will be established and maintained by the Assignment Commissioner. All cases shall be placed on the Reserve Calendar ten (10) days after the disposition of all motions filed pursuant to paragraph (d) hereof. The docket number and date of placement on the Reserve Calendar will be indicated. The Assignment Commissioner shall furnish copies of the Reserve Calendar to the Chief Judge and the United States Attorney each month and each two months he shall furnish a copy of the Reserve Calendar to the Washington Law Reporter for publication. The Assignment Commissioner shall notify defense counsel when cases in which they are to appear have been placed on the Reserve Calendar.

(h) The United States Attorney will certify to the Assignment Commissioner cases which are ready for trial. A ready case will be placed upon a Ready Calendar to be established and maintained by the Assignment Commissioner. Copies will be furnished each week to the Chief Judge and to the United States Attorney. Cases will be listed on that calendar will be numbered chronologically by dates of certification and the calendar will reflect whether or not the defendants are in jail or on bail. Once a case reaches the Ready Calendar it will remain there until tried. Applications for continuances prior to assignment out for trial (see Paragraph j) may be made only before the Chief Judge and except in cases of emergency such applications will be in writing. Applications for continuance after assignment out for trial will be made to the judge to whom assigned. Continuances will be granted only for good cause shown. When a continuance is granted the case will not revert to the bottom of the trial list but will be reinserted in the list as close as possible to its original position. If the continuance is to a date certain, such case shall be placed at the top of the calendar for trials on said date.

(i) The Ready Calendar will be published once each two weeks in the Washington Law Reporter.

(j) Cases will be assigned to trial parts as nearly as practicable in chronological order with an overriding preference, however, to be given to jail cases.

(k) As a trial judge approaches the end of his given assignment, he will notify the Assignment Commissioner of his prospective freedom and his ability to take a new case so that the Assignment Commissioner will always be aware of the possible open trial parts.

(l) The Chief Judge, in his discretion, may assign so-called "special cases" to a particular judge for all purposes including pretrial, pretrial motions and actual trial.

(m) On the first court day of each month, the Assignment Commissioner shall submit to the Chief Judge a list of all cases on the Ready Calendar as to which two or more continuances have been granted and by whom such continuances were requested. If the Chief Judge determines that any case is not being given appropriate attention in accordance with the provisions of Rule 48 (b) of the Federal Rules of Criminal Procedure and the Sixth Amendment to the Constitution, he will call that matter to the attention of the United States Attorney to the end that the case be set for trial forthwith or dismissed or otherwise disposed of as justice may require.

(n) The United States Attorney shall designate an Assistant United States Attorney to act as liaison between the Chief Judge, the United States Attorney's office and the Assignment Commissioner. It will be the responsibility of such Assistant to maintain in current status the trial lists of the Assistant United States Attorneys and to insure that cases are certified to the Ready Calendar in orderly fashion.

(o) The issuance of subpoenas and the control of witnesses will be the responsibility of counsel.

(p) The Chief Judge in the exercise of discretion and in the interest of justice may at any time either place a case on, or remove a case from, the Reserve Calendar or the Ready Calendar. Such a disposition may be made by the Chief Judge either on his initiative or on motion of counsel.

(q) Any provision of Rule 11 or any provision of the footnotes to that Rule which is inconsistent with any provision of new Rule 87 is hereby repealed."

STATEMENT OF POINTS

1. A delay of 537 days between arrest and trial caused by the prosecution and the court calendar is so inherently unreasonable and prejudicial as to violate appellant's constitutional right to a speedy trial.

2. The trial court's instructions to the jury with respect to self-defense were so confusing, erroneous and misleading, particularly in implying that the burden of proof was on appellant, as to effectively deprive appellant of a fair trial.

[With respect to Point 2, appellant desires the court to read the following pages of the reporter's transcript: Supp. Tr. 2 - 13, inclusive.]

SUMMARY OF ARGUMENT

While appellant's case was set for trial with reasonable promptness following his arraignment, the trial was thereafter continued four successive times without his consent and thereafter was indefinitely postponed without court action until finally belatedly certified to the bottom of a "ready" trial calendar by the prosecution. The resulting delay of some 537 days between arrest and trial was thus arbitrary, capricious, and patently so prejudicial as to violate appellant's constitutional right to a speedy trial.

In a murder prosecution, appellant's sole defense was that he killed the deceased in self-defense during an unprovoked attack on appellant in his own home. In its instructions to the jury, the trial court gave such confusing instructions regarding self-defense, particularly as to imply that the burden of proof was upon appellant, that appellant was effectively deprived of a fair trial.

ARGUMENT

I. Appellant Was Denied A Speedy Trial

By order dated September 1, 1966, the District Court amended its Criminal Rule 87--to be effective October 3, 1966. The new rule established new procedures for the handling of criminal cases. A "reserve calendar" was established. Criminal cases are placed on this list by the Assignment Commissioner after ten days from the disposition of any motions filed in accordance with the rules. A 'Ready Calendar' of cases ready for trial was also created. A case is placed on this list when the United States Attorney certifies to the Assignment Commissioner that it is ready for trial. Cases are then assigned for trial "as nearly as practicable in chronological order with an overriding preference, however, to be given to jail cases ' (District Court Rule 87)

Appellant was arrested on August 15, 1965--the date of the alleged offense. His case was originally scheduled for trial on November 16, 1965. However, it was continued four times thereafter--none at the request of or with the consent of appellant--with the last trial date being July 12, 1966. The record is barren of any reason why the case was not tried on that date or of any disposition made by the court. When the District Court's new rule as to the assignment of criminal cases was promulgated in September of 1966, appellant's case had neither been tried nor, apparently, even set for trial. When the first calendars were established

pursuant to the new rule, appellant's case, although it had been ready for trial at least since November 16, 1965, some ten months earlier, was not certified to and placed on the "ready" calendar of cases for trial. It appeared instead on the 'reserve' list. It was not until the list of November 14, 1966--a year from the original trial date--that the case finally appeared on the 'ready' calendar. On January 3, 1967, appellant's counsel sought and was granted his first postponement, and the case was set for February 6, 1967. The trial commenced two days later--some 15 months from the original trial date and 18 months from the date of the alleged offense and appellant's arrest.

The Supreme Court most recently referred to the Sixth Amendment's speedy trial guarantee as,

> "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself. * * * 'Whether delay in completing a prosecution . . . amounts to an unconstitutional deprivation of rights depends upon the circumstances . . . The delay must not be purposeful or oppressive,' Pollard v. United States, 352 U.S. 354, 361" 1/

This Court recently spoke of the standards thusly,

> "Whether a delay in bringing a defendant to trial results in a denial of his right to a speedy trial requires an analysis of the particular circumstances of each case. There is no touchstone of time which sets a fixed maximum period that automatically requires application of the Sixth Amendment and dismissal of the indictment. Time is but one factor, albeit the most important; the longer the time between arrest

1. United States v. Ewell, 383 U.S. 116, 120 (1966)

> and trial, the heavier the burden of the Government in arguing that the right to a speedy trial has not been abridged. Other factors to be considered are the reasons for the delay, the diligence vel non of the prosecutor, court, and defense counsel, and the likelihood, or at least reasonable possibility, that defendant has been prejudiced by the delay." 2/

In this case it is clear that there has been delay of the type referred to as "arbitrary, purposeful, oppressive or vexatious." 3/ No reason appears why appellant's case could not be brought to trial within a reasonable length of time. As appears from the new District Court rule, the United States Attorney has control of assigning cases to the trial calendar and thus is directly responsible for at least part of the unreasonable delay here within the doctrine of the Provoo, 4/ Taylor, 5/ and McWilliams 6/ cases.

An extended delay of this nature is patently unreasonable and unequivocally prejudicial. Such a delay has not only the danger of resulting in unavailability of critical witnesses but perhaps in an even more prejudicial effect--the dimming of the witnesses' recollections. With the passage of time details often become forgotten and initial untested impressions become fixed realities. The only witnesses to the altercation between appellant and the deceased were appellant and Mrs. Renfrow. Her memory at trial was such that the prosecutor initially

2. Hedgepeth v. United States, 124 U.S.App.D.C.291,364 F.2d 684,687 (1966).
3. Smith v. United States, 118 U.S.App.D.C. 38,331 F.2d 784,787 (1964).
4. 17 F.R.D. 183 (D. Md 1955), aff'd 350 U.S. 857 (1955).
5. 99 U.S.App.D.C. 183,238 F.2d 259 (1956).
6. 82 U.S.App.D.C. 259, 163 F.2d 695 (1947)

sought to claim surprise as to her testimony on the basis that it was not complete--this despite the fact that her recollection apparently had been "refreshed" both that day as well as the day before by a statement she had given the police. (Tr. 13, 18) In any event, as indicated in the Provoo decision, 'prejudice is presumed, or necessarily follows, from long delay." 7/

This Court expressed "concern' over a delay of 106 days between arrest and arraignment in the recent Hood decision. 8/ In King v. United States, 105 U.S.App.D.C. 193,265 F.2d 567 (1959), cert. denied 359 U.S. 998 (1959). This Court, sitting en banc, reviewed the District Court's calendar procedure as it then existed, and finally held that the delay there of 140 days, 60 of which had been requested by defense counsel, caused by a crowded court calendar, was not such a prolonged period as to be a denial of speedy trial in a constitutional sense. Here, however, the delay amounted to 88 days from arrest to the first trial date, and then 238 days until the last fixed trial date, which was then followed by 125 more days until appearance on the 'ready' calendar, and 86 more days until trial--a total of 537 days from arrest until trial. Such a delay amounts to a denial of a speedy trial per se. 9/ As Chief Judge Bazelon wrote in behalf of the four dissenting judges in the King case,

7. Provoo, supra.
8. Hood v. United States, 125 U.S.App.D.C. 16, 365 F.2d 949 (1966)
9. There is no indication here that any delay was caused by preference being given to cases where the defendants were incarcerated as was approved in Dockery v. United States, ____U.S.App.D.C.____,

> ' But the application of that amendment, providing that 'the accused shall enjoy the right to a speedy . . . trial', does not turn on the question of responsibility. Even if no agency or instrumentality of the Government is responsible for the delay, where there has in fact been a substantial delay not of the defendant's own choosing--i.e. where he has not waived his right to a speedy trial--there has in law been a denial of a speedy trial." 10/

II The Trial Court's Instructions Were Erroneous and Confusing

Appellant was indicted for second degree murder. He did not dispute the killing, but claimed that it was done in self-defense. The trial court's instructions were thus peculiarly critical on this point. It propounded the law to the jury as follows:

> "Did he do this act, wound or inflict these injuries in self-defense? If you find that he did under the instructions that I am about to give you, then he is not guilty of anything under the law. This is what the law says self-defense means.'
>
> "Now, the jury is instructed that if you find that the defendant Roosevelt Bynum, was not the aggressor, that he had reasonable grounds to believe that he was actually in imminent danger of death or actual bodily harm from which he could save himself only by using a deadly force against his assailant, he had the

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9. (continued) _____F.2d _____ (No. 20,828, decided January 31, 1968) and in Wilkins v. United States, _____ U.S.App.D.C. _____, _____ F.2d _____ (No. 20,676, decided April 11, 1968). Indeed, there is no indication that in the assignment of cases to trial any preference is given to "jail" cases even though the District Court rule so provides.
10. King v. United States, supra, p. 573.

right to employ a deadly force. A deadly force is a force that is likely to produce death or serious bodily harm." (Tr. 83)[11]

That the jury was confused by the court's instructions, particularly as to self-defense is evidenced by their two subsequent notes, to the court.

"We would like the following definitions:
1. Malicious
2. Criteria for a self-defense plea
3. Manslaughter
4. Assault with a deadly weapon."

and,

'Does self-defense enter into the verdict of not guilty, manslaughter, or guilty of assault." (Supp. Tr. 2)

The court answered these critical questions thusly,

"I don't know whether this will answer your question or not. Now, if you believe that the defendant acted in self-defense, it is up to you to believe it. Now I will read you that part:

'If you should find that the defendant is acting in self-defense--that he inflicted a blow or blows which caused injury to the decedent, then you could not, or cannot find him guilty of second degree murder or manslaughter or assault with a dangerous weapon. He would be 'not guilty' of all of these things under the law and he would be acting in self-defense. Does that answer your question?' (Supp. Tr. 2,3)[12]

11. The validity of these statements are questionable. This Court has said, 'One who is attacked may repel the attack with whatever force he reasonably believes is necessary under the circumstances, but only if he has not provoked the fight"[Harris v. United States, 124 U.S.App. D.C. 308,364 F.2d 701,702 (1966)], and 'It is reasonable, . . ., to use a deadly weapon in defense against an attack with one, though in general the defender must use the weapon in a reasonable manner, i.e. only to the extent he reasonably thinks is required to save his own life or to avert serious bodily harm."[Inge v. United States, 123 U.S.App.D.C. 6, 356 F.2d 345,348 (1966)].

12. Ibid, pages 2-3

The jury thus was left with the erroneous impression that it was incumbent upon appellant to prove that he acted in self-defense rather than the Government to prove that he did not. To compound this, later in advising the jury that they could return any one of four verdicts, the court said,

> 'First you may find the defendant not guilty. If you do find him not guilty you will have to be convinced that he acted in self-defense and then he would not be guilty of anything, is that clear?" (Supp. Tr. 8)

While the trial court finally did mention that it was the Government's burden to prove beyond a reasonable doubt that appellant did not act in self-defense, it was too little and too late to correct the damage already done. The final instruction--apparently given to cover the limits of excessive force--was

> 'Now the crime of self-defense is not necessarily defeated if greater force than would have been necessary in cold blood, when used by the defendant in the heat of passion generated by an assault, a belief that may have been unreasonable in cold blood may be actually and reasonably obtained from the heat of passion." (Supp. Tr. 13) 13/

While these instructions were not challenged at trial, under the circumstances, they constitute plain error affecting substantial rights which may be corrected by Rule 52(b) of the Federal Rules of Civil Procedure. See Inge v. United States, supra.

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13. Compare Inge v. United States, supra; Brown v. United States, 256 U.S. 335 (1921).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be reversed, and that the case be dismissed or, in the alternative, that appellant be granted a new trial.

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Attorney for Appellant
(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,980

ROOSEVELT BYNUM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER.
SEYMOUR GLANZER.
CARL S. RAUH.
Assistant United States Attorneys.

Cr. No. 1043-65

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) Was appellant denied his constitutional right to a speedy trial because of the eighteen month delay between his arrest and trial, where (a) appellant, who had retained counsel, did not demand a speedy trial, did not move to dismiss the indictment, did not object to the continuances and in fact was responsible for three continuances, (b) the delay was not arbitrary or purposeful but rather was caused by the crowded criminal courts and by both counsel being engaged in other trials and (c) appellant, who was released on bond pending trial, was not prejudiced at trial by the delay?

2) Were the trial court's additional instructions on self-defense (which were not objected to below) plain error, where the trial court instructed the jury that "if evidence of self defense is present, the Government must then prove, beyond a reasonable doubt, that the defendant did not act in self defense" and "if you have a reasonable doubt as to whether or not the defendant acted in self defense, then your verdict must be not guilty"?

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OTHER REFERENCES

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* Cases and other references chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,980

ROOSEVELT BYNUM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant Bynum was indicted for second degree murder (22 D.C. CODE § 2403 (1967)). After trial before a jury and District Judge Sirica on February 8 and 9, 1967, the jury found appellant guilty of the lesser included offense of manslaughter (22 D.C. CODE § 2405 (1967)). Appellant was sentenced to imprisonment for five to fifteen years.

Pre-Trial Proceedings

Appellant was arrested on August 15, 1965 and was tried on February 8 and 9, 1967. Appellant was released

on bond during this eighteen month period between arrest and trial (except for the first week), and was represented by *retained* counsel. At no time during this eighteen month period did appellant make a motion to dismiss the indictment for lack of speedy trial, nor did appellant request the trial be expedited nor did he object to the case being continued. In fact, appellant was responsible for three continuances. For the Court's convenience, the pretrial procedural history is set out below in chart form.

August 15, 1965	Appellant arrested.
August 16, 1965	Appellant presented to the United States Commissioner. Case continued until August 24, 1965 for a preliminary hearing. Appellant committed.
August 24, 1965	Appellant's retained attorney, William Tinney, appeared on behalf of appellant and represented appellant at his preliminary hearing. Appellant held for action of the Grand Jury. Appellant released on bond.
September 20, 1965	Appellant indicted for second degree murder. (Cr. No. 1043-65.)
October 1, 1965	Appellant arraigned. Appellant's retained attorney, William Tinney, entered his appearance.
November 16, 1965	Case continued until December 8, 1965 because the court could not reach case.
November 18, 1965	Case continued at appellant's request until January 4, 1966 because appellant's counsel had another case set for December 8, 1965.
January 4, 1966	Case continued at Government's request because the prosecutor assigned to the case was in trial in another case. Appellant's counsel requested a March date. Case set for March 7, 1966.

March 7, 1966	Case continued at Government's request until April 26, 1966 because the prosecutor assigned to the case was in trial in another case.
April 26, 1966	Case continued at Government's request until May 31, 1966 because the prosecutor assigned to the case was in trial in another case.
May 19, 1966	Case continued at appellant's request until July 12, 1966 because appellant's attorney has a jail case set for trial on May 31, 1966.
July 12, 1966	Case continued without a date certain.
October 3, 1966	Rule 87 of the Criminal Rules of the United States District Court for the District of Columbia became effective.
November 3, 1966	Case placed on the Ready Calendar.
January 3, 1967	Case continued at appellant's request until February 6, 1967.
February 8, 1967	Trial began. Appellant represented by his retained counsel, William Tinney.
February 9, 1967	Trial ended. Appellant convicted of manslaughter.

The Trial

The Government's Case

On August 15, 1965, Appellant Bynum and Mrs. Mabel Renfrow were living together in the first floor apartment at 637 Maryland Avenue, Northeast (Tr. 8(b), 9, 32, 34, 37).[1] Mrs. Renfrow was legally married to one Willie Smith but she had been separated from him for several years (Tr. 8(b)-9, 29, 30, 37-39). On occasion Willie

[1] The transcript of the trial proceedings of February 8 and 9, 1967 will be referred to as "Tr." except that the transcript of the additional instructions to the jury on February 9, 1967 will be referred to as "X Tr."

Smith visited at 637 Maryland Avenue to see Mrs. Renfrow's children, one of which was his (Tr. 10, 11, 29, 33, 35, 36). On the evening of August 15, 1965, Willie Smith decided to visit at 637 Maryland Avenue and arrived there accompanied by appellant (Tr. 9). Both Smith and appellant were fed dinner by Mrs. Renfrow in the kitchen (Tr. 9-10, 11). After dinner Smith and appellant drank some gin in the kitchen (Tr. 11). Sometime later an argument developed in the kitchen because Smith and appellant over when Smith was going home (Tr. 10, 11). Smith picked up a plate and raised it over his head (Tr. 12, 28-29). Appellant took hold of a butcher knife (Tr. 12, 28, 73). Mrs. Renfrow, hearing the argument, went to the kitchen and observed appellant stab Smith with the knife (Tr. 28).[2] Mrs. Renfrow then ran out of the house to summon the police (Tr. 13, 28).

After appellant had butchered Smith and left him lying on the kitchen floor with 30 stab and cut wounds, appellant ran out of the house holding the knife and a dish cloth (Tr. 6, 8, 21). At this time, which was approximately 10:30 p.m., Officers Edward Bostek and Robert Moriarty, Metropolitan Police Department, pulled up to the curb near 637 Maryland Avenue in their police cruiser (Tr. 4-6). Appellant approached Officer Bostek, handed him the knife and dish cloth and stated that he had just killed someone (Tr. 6-8).[3] Smith then led Officer Bostek

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[2] When Mrs. Renfrow was first asked by the prosecutor what she saw appellant do with the knife, she was evasive (Tr. 9). She was evasive either because she did not understand the question or because she was trying to help appellant. At the time of trial, Mrs. Renfrow was living with appellant (Tr. 9). After the prosecutor pointed out to the court that Mrs. Renfrow had testified before the Grand Jury that she saw appellant stab Smith and that Mrs. Renfrow had repeated this to the prosecutor before trial, a short hearing was held out of the presence of the jury (Tr. 13, 27). Thereafter, Mrs. Renfrow returned to the stand in front of the jury and testified that she saw appellant stab Smith with the knife (Tr. 28).

[3] The knife and dish cloth were admitted into evidence (Tr. 8(a)-8(b)).

into the apartment and to the kitchen where Officer Bostek observed the body of Smith (Tr. 8). The entrance to the kitchen was not blocked (Tr. 8(a)). Smith was lying unconscious on the kitchen floor near the rear exit of the kitchen and his arms were raised towards his head (Tr. 8-8(a)). Near the entrance to the kitchen, some five or six feet away from the body, was a broken plate (Tr. 8(a)). An ambulance was summoned (Tr. 8(a)).

Smith was pronounced dead on arrival at D.C. General Hospital (Tr. 3-4). Around noon on August 16, 1965, Dr. Marion Mann, Deputy Coroner for the District of Columbia, performed an autopsy on the body of Smith (Tr. 19-21). Dr. Mann found "a total of 30 cuts and stab wounds on the body" "located in the neck, chest, abdomen, both arms and the left hand" (Tr. 21). Fifteen of these cuts and stab wounds were considered by Dr. Mann to be deep (Tr. 23). There were three deep wounds that penetrated the breastbone; two of these penetrated the heart and were obviously fatal (Tr. 22). It required great force to penetrate the breastbone (Tr. 22). There were twelve deep abdominal wounds which penetrated the intestines, liver and pancreas; one of the wounds that penetrated the liver was 4½ inches deep (Tr. 23). Dr. Mann also found a sufficient amount of alcohol in Smith's blood to be able to conclude that Smith had been intoxicated (Tr. 24). Dr. Mann testified that being intoxicated would make a person less capable of defending himself (Tr. 26). Dr. Mann also testified that Smith weighed approximately 172 pounds (Tr. 24-25).[4]

Appellant's Defense

Appellant took the stand in his own behalf and attempted to exculpate himself by presenting a self-defense claim.[5] Appellant testified that when he was attempting to persuade Smith to go home, Smith jumped up and said,

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[4] Appellant weighed 180 pounds (Tr. 52).

[5] The prosecutor agreed not to impeach appellant with a 1957 assault with a dangerous weapon conviction (Tr. 41).

"I'm going to do you in this time" (Tr. 50). According to appellant, Smith grabbed a plate and struck appellant over the head with it, and in response appellant "got the knife and started stabbing" (Tr. 50, 52, 55, 57). Appellant testified, "I just got to stabbing, and he was grabbing at me and I just was stabbing" and "I didn't stop until he fell on the floor" (Tr. 55, 65). Appellant claimed he was not trying to kill Smith, but when asked on cross-examination what danger he was in after he stabbed Smith for the second or fourth or fifth time, appellant was unable to answer (Tr. 50, 62, 63).

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

Title 22, District of Columbia Code, Section 2403, provides:

> Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree.

Title 22, District of Columbia Code, Section 2405, provides:

> Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment.

Rule 30, Federal Rules of Criminal Procedure, provides in pertinent part:

> * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *

Rule 48(b), Federal Rules of Criminal Procedure, provides:

> *By Court.* If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

Rule 52, Federal Rules of Criminal Procedure, provides:

> (a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Rule 87 of the United States District Court for the District of Columbia, provides in pertinent part:

> (a) Immediately following the return of an indictment the United States Attorney will assign that case to an Assistant United States Attorney for all purposes.
>
> (b) On the second Friday following indictment the defendant will be arraigned and counsel ascertained. The details of all arraignments on that particular day will be handled by one Assistant United States Attorney designated for that purpose.
>
> * * * *
>
> (d) All motions (e.g., discovery, suppression of evidence, severance, mental observation, etc.) must be in writing and filed within ten (10) days after arraignment. No extensions of time will be granted and no tardy motions considered except for good cause shown. Motions will be set for hearing the second Friday following the filing of the motions. The Government shall respond in writing to any motions presenting com-

plex fact situations or substantial questions of law, and in any event upon request of the trial judge, citing authority in support of the Government position. The Government response shall be filed not less than two (2) days prior to the date set for hearing of the motion.

* * * *

(g) A Reserve Calendar will be established and maintained by the Assignment Commissioner. All cases shall be placed on the Reserve Calendar ten (10) days after the disposition of all motions filed pursuant to paragraph (d) hereof. The docket number and date of placement on the Reserve Calendar will be indicated. The Assignment Commissioner shall furnish copies of the Reserve Calendar to the Chief Judge and the United States Attorney each month and each two months he shall furnish a copy of the Reserve Calendar to the Washington Law Reporter for publication. The Assignment Commissioner shall notify defense counsel when cases in which they are to appear have been placed on the Reserve Calendar.

(h) The United States Attorney will certify to the Assignment Commissioner cases which are ready for trial. A ready case will be placed upon a Ready Calendar to be established and maintained by the Assignment Commissioner. Copies will be furnished each week to the Chief Judge and to the United States Attorney. Cases will be listed on that calendar will be numbered chronologically by dates of certification and the calendar will reflect whether or not the defendants are in jail or on bail. Once a case reaches the Ready Calendar it will remain there until tried. Applicants for continuances prior to assignment out for trial (see Paragraph j) may be made only before the Chief Judge and except in cases of emergency such applications will be in writing. Applications for continuance after assignment out for trial will be made to the judge to whom

assigned. Continuances will be granted only for good cause shown. When a continuance is granted the case will not revert to the bottom of the trial list but will be reinserted in the list as close as possible to its original position. If the continuance is to a date certain, such case shall be placed at the top of the calendar for trials on said date.

* * * *

(j) Cases will be assigned to trial parts as nearly as practicable in chronological order with an overriding preference, however, to be given to jail cases.

* * * *

SUMMARY OF ARGUMENT

I

Appellant was not denied his constitutional right to a speedy trial because of the eighteen month delay between his arrest and trial. Appellant did not demand a speedy trial below and therefore waived this right. Appellant, who had retained counsel, did not request that the trial be expedited, did not move to dismiss the indictment, did not object to the continuances and, in fact, was responsible for three continuances. In addition, the delay in this case was not arbitrary or purposeful but rather was caused by the crowded criminal courts and by both counsel being engaged in other trials. Finally, appellant, who was released on bond pending trial, was not prejudiced at trial by the delay.

II

Appellant contends for the first time on appeal that the trial court's additional instructions on self-defense "left [the jury] with the erroneous impression that it was incumbent upon appellant to prove that he acted in self-defense rather than the Government to prove that he did not." We disagree. The trial judge in his additional instructions on self-defense instructed the jury in no uncer-

tain terms that "if evidence of self defense is present, the Government must then prove, beyond a reasonable doubt, that the defendant did not act in self defense" and "if you have a reasonable doubt as to whether or not the defendant acted in self defense, then your verdict must be not guilty." These additional instructions on self-defense, which are identical to those suggested in *Criminal Jury Instruction No. 127*, Junior Bar Section of D.C. Bar Ass'n (1966), did not leave the jury with an erroneous impression of the law.

ARGUMENT

I. Appellant was not denied his constitutional right to a speedy trial.

Appellant contends for the first time on appeal that he was denied his constitutional right to a speedy trial by the eighteen month delay between his arrest on August 15, 1965 and his trial on February 8 and 9, 1967.[6] We believe appellant's contention must fail since (1) appellant, who was represented by retained counsel, did not object to the delay or demand a speedy trial, and was equally responsible for the delay, having requested three continuances, (2) the delay was not arbitrary or purposeful but rather was caused by the crowded criminal courts and by both counsel being engaged in other trials and (3) appellant, who was released on bond pending trial, was not prejudiced at trial by the delay.

The law in the District of Columbia and in other federal circuits is that the failure of an accused to *demand* a speedy trial constitutes a waiver of the accused's right to a speedy trial. *E.g.*, *Mathies* v. *United States*, 126 U.S. App. D.C. 98, 100 n.1, 374 F.2d 312, 314 n.1 (1967); *James* v. *United States*, 104 U.S. App. D.C. 263, 261 F.2d 381 (1958), *cert. denied*, 359 U.S. 930 (1959); *United States* v. *Kaufman*, 311 F.2d 695 (2d Cir. 1963); *United States* v. *Hill*, 310 F.2d 601 (4th Cir. 1962); *United*

[6] Brief for Appellant, pp. 11-15.

States v. *Lustman*, 258 F.2d 475 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958). The reason for the rule is clear: an accused cannot both acquiese in the delay and claim he was denied a speedy trial. The Second Circuit made this clear in *United States* v. *Lustman*, *supra* at 478:

> The federal decisions . . . clearly establish that the right to a speedy trial is the defendant's personal right and is deemed waived if not promptly asserted. . . . The requirement of a demand . . . "stresses that the right to a speedy trial is not designed as a sword for defendant's escape, but rather as a shield for his protection." Note, *The Right to a Speedy Criminal Trial*, 57 COL. L. REV. 846, 853 (1957).

In the case at bar appellant never demanded a speedy trial. Appellant never requested the court below to expedite the trial nor did appellant ever object to the case being continued. In fact, appellant was responsible for three continuances. In addition, appellant never requested pursuant to the Sixth Amendment or FED. R. CRIM. P. 48 (b) that the indictment be dismissed. Appellant, who was released on bond, seemed quite satisfied to have the case delayed as long as possible. Under these circumstances, appellant is deemed to have waived his right to a speedy trial and cannot now raise it for the first time on appeal.

In addition, the rights of society in having an accused brought to trial will be upset "only where the delay [in bringing him to trial] has been arbitrary, purposeful, oppressive or vexatious." *Smith* v. *United States*, 118 U.S. App. D.C. 38, 41, 331 F.2d 784, 787 (1964) *(en banc)*. The delay in the case at bar was certainly not "arbitrary, purposeful, oppressive or vexatious." Appellant was responsible for three continuances, two of these continuances were because appellant's retained counsel was involved in other cases. The Government was also responsible for three continuances; these continuances were necessary because the prosecutor assigned to this case was engaged in trial in other cases.[7] The remainder

[7] When the Government requested its first continuance because the prosecutor was engaged in trial, appellant suggested the case be continued for two months.

of the delay was caused primarily by the inability of the court to reach this case. This delay rather than being arbitrary or purposeful "was an unfortunate consequence of the crowded criminal courts." *Evans* v. *United States*, No. 20,480, D.C. Cir., May 8, 1968, at 4. Under these circumstances, appellant was not denied his right to a speedy trial. Similar delays ranging from twelve to nineteen months have been sustained. *United States* v. *Ewell*, 383 U.S. 116 (1966) (19 months); *Evans* v. *United States*, No. 20,480, D.C. Cir., May 8, 1968 (14 months); *Wilkins* v. *United States*, No. 20,676, D.C. Cir., April 11, 1968 (16½ months); *Dockery* v. *United States*, No. 20,828, D.C. Cir., January 31, 1968 (15 months); *Hedgepeth* v. *United States (Hedgepeth II)*, 125 U.S. App. D.C. 19, 365 F.2d 952 (1966) (14 months); *Hedgepeth* v. *United States (Hedgepeth I)*, 124 U.S. App. D.C. 291, 364 F.2d 684 (1966) (12 months).

Finally, appellant has failed to show that he was prejudiced at trial by the delay.[8] There was no dispute at trial that appellant killed the decedent by inflicting 30 cuts and stab wounds. Appellant testified at trial and presented a self-defense claim. In addition, appellant was released on bond pending trial. Absent a showing of prejudice, appellant's claim of denial of his right to a speedy trial cannot prevail. *United States* v. *Ewell*, *supra*; *Evans* v. *United States*, *supra*; *Wilkins* v. *United States*, *supra*; *Dockery* v. *United States*, *supra*; *Hedgepeth*

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[8] Appellant half-heartedly suggests he was prejudiced because Mrs. Renfrow was at first evasive as to whether she saw appellant stab the decedent. Brief for Appellant, pp. 13-14. Mrs. Renfrow's evasiveness was due either to her failure to understand the question asked or to her desire to help appellant. At the time of trial, Mrs. Renfrow was living with appellant (Tr. 9). After the prosecutor pointed out to the court that Mrs. Renfrow had told him before trial that she had seen appellant stab the decedent, a short hearing was held outside the presence of the jury (Tr. 13, 27). Thereafter, Mrs. Renfrow returned to the stand and testified to the jury that she saw appellant stab the decedent with the knife (Tr. 28). This certainly did not prejudice appellant. This is especially so in light of the fact that appellant did not dispute the fact that he stabbed the decedent.

v. *United States (Hedgepeth II)*, *supra*; *Hedgepeth* v. *United States (Hedgepeth I)*, *supra*.

II. The trial court's additional instructions on self-defense were not error, let alone plain error.

Appellant contends for the first time on appeal that the trial court's additional instructions on self-defense "left [the jury] with the erroneous impression that it was incumbent upon appellant to prove that he acted in self-defense rather than the Government to prove that he did not."[9] We strenuously disagree. After the jury had been instructed and had deliberated for a little while, the jury wrote a note to the judge requesting that several instructions be given again (X Tr. 2). The trial judge complied and carefully instructed the jury again, including instructions on self-defense (X Tr. 1-14). Appellant's *experienced* and *retained* trial counsel, who was in the best position to evaluate the effect of the additional, self-defense instructions upon the jury, did not object to the instructions. Therefore, appellant should be precluded on appeal from contending that these additional self-defense instructions were improper, since clearly these instructions on self-defense (which conformed to *Criminal Jury Instruction Nos. 127, 130*, Junior Bar Section of D.C. Bar Ass'n (1966)) did not amount to plain error affecting substantial rights of appellant. FED. R. CRIM. P. 30; *Kelly* v. *United States*, 124 U.S. App. D.C. 44, 361 F.2d 61 (1966); *Robertson* v. *United States*, 124 U.S. App. D.C. 309, 364 F.2d 702 (1966); *Williams* v. *United States*, 116 U.S. App. D.C. 131, 321 F.2d 744, *cert. denied*, 375 U.S. 898 (1963); *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950). This is especially so in light of the weakness of appellant's self-defense claim. Appellant claimed that to defend himself against the decedent's attack with a plate it was necessary to inflict with a knife 30 cuts and stab wounds on the decedent. The truth of the matter is that

[9] Brief for Appellant, pp. 16-17.

appellant was very lucky to be convicted of manslaughter; he should have been convicted of second degree murder.

Near the end of the additional instructions, the trial judge instructed on self-defense (X Tr. 11-13). The trial judge charged the jury in no uncertain terms that "if evidence of self defense is present, the Government must then prove, beyond a reasonable doubt, that the defendant did not act in self defense" and "if you have a reasonable doubt as to whether or not the defendant acted in self defense, then your verdict must be not guilty" (X Tr. 12):[10]

> * * * If evidence of self defense is present, the Government must then prove, beyond a reasonable doubt, that the defendant did not act in self defense. If you find the Government has failed to prove beyond a reasonable doubt that the defendant did not act in self defense, you must find the defendant not guilty. In other words, if you have a reasonable doubt as to whether or not the defendant acted in

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[10] The two statements on self-defense in the court's additional jury instructions which appellant complains of are as follows:

> (1) I don't know whether this will answer your question or not. Now, if you believe that the defendant acted in self defense, it is up to you to believe it. Now I will read you that part:
>
> If you should find that the defendant is acting in self-defense—that he inflicted a blow or blows which caused injury to the decedent, then you could not, or cannot find him guilty of second degree murder or manslaughter or assault with a dangerous weapon. He would be "not guilty" of all of these things under the law and he would be acting in self defense. Does that answer your question? (X Tr. 2-3.)
>
> (2) * * * First you may find the defendant not guilty. If you do find him not guilty you will have to be convinced that he acted in self defense and then he would not be guilty of anything, is that clear? * * * (X Tr. 8.)

Both these statements were intended to inform the jury that if there appeared to be a valid self-defense claim, then appellant would be not guilty on all possible charges. Neither of these statements were intended to instruct the jury on the burden of proving or disproving a self-defense claim.

self defense, then your verdict must be not guilty. (X Tr. 12.)[11]

This instruction is identical to the one suggested in *Criminal Jury Instruction No. 127*, Junior Bar Section of D.C. Bar Ass'n (1966). Clearly, the additional instructions on self-defense were not error, let alone plain error.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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[11] The court gave a similar instruction in its original charge to the jury:

> The Government must prove beyond a reasonable doubt that the defendant did not act in self-defense. * * *
> In other words, if you have a reasonable doubt as to whether or not the defendant acted in self-defense, your verdict must be not guilty. (Tr. 84.)

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